United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4009

B
P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-4009

SALANT CORPORATION, d/b/a CARRIZO MANUFACTURING CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review an Order of the National Labor Relations Board

BRIEF FOR PETITIONER

Carrizo Manufacturing Co., Inc.

CONSTANGY, BROOKS & SMITH
GEORGE B. SMITH
LOWELL W. OLSON
ALAN L. ROLNICK
1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 525-8622
Attorneys for Petitioner, Salant Corporation, d/b/a Carrizo Manufacturing Co., Inc.

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

1

TABLE OF CONTENTS

	Page
I. Questions Presented	1
II. Statement of the Case	2
A. Procedural history	2
B. Factual background	3
III. Argument	12
A. The discharge issues	12
1. Carlos Juarez and Pedro Patlan	12
(a) Supervisors are not protected by the National Labor Relations Act	12
(b) The board's factual findings are not supported by substantial evidence in the record considered as a whole	13
2. Rebecca Patlan	18
(a) The record as a whole impels the conclusion that Rebecca Patlan was a confidential employee not protected by the Act	18
(b) An employee may be discharged for any reason not prohibited by the Act	18
B. The grant of benefits	20
Where a decision to grant benefits has been made prior to the advent of any union activity, it is not unlawful to implement the decision contemporaneously with the union activity and in response to complaints from employees	20

C. The interrogation 21

1. A supervisory employee may lawfully be questioned regarding his knowledge of concerted activity by employees 21

2. The interrogation herein did not exceed the limited questioning permitted by this court's decision in Bourne v. NLRB, 332 F.2d 47 (2nd Cir. 1964) 21

IV. Conclusion 22

TABLE OF AUTHORITIES CITED

Cases

Amalgamated Local 355 v. NLRB, 481 F.2d 996 (2nd Cir. 1973) 14

Arizona Public Service Co. v. NLRB, 453 F.2d 228 (9th Cir. 1971) 13, 16

Beasley v. Food Fair, Inc., — U. S. —, 94 S. Ct. 2023, 40 L.Ed.2d 443 (1974) 12

Bourne v. NLRB, 332 F.2d 47 (2nd Cir. 1964) 22

Brewton Fashions, Inc. v. NLRB, 361 F.2d 8 (5th Cir. 1966), cert. denied 385 U.S. 842 16

Mathews & Co. v. NLRB, 354 F.2d 432 (8th Cir. 1965), cert. denied 384 U.S. 1002 15

NLRB v. Bell Aerospace Co., 416 U.S. 267, 40 L.Ed.2d 134 (1974) 12

NLRB v. Big Ben Department Stores, Inc., 396 F. 2d 78 (2nd Cir. 1968) 14

NLRB v. Big Three Welding Equipment Co., 359 F.2d 77 (5th Cir. 1966) 12

NLRB v. Excelsior Laundry Co., 459 F.2d 1013 (10th Cir. 1972) 15

NLRB v. Greenfield Components Corp., 317 F.2d 85 (1st Cir. 1963) 15
NLRB v. Kolpin Bros. Co., 379 F.2d 488 (7th Cir. 1967) 17
NLRB v. M. H. Brown Co., 441 F.2d 839 (2nd Cir. 1971) 20, 22
NLRB v. Marsellus Vault & Sales, Inc., 431 F.2d 933 (2nd Cir. 1970) 15
NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956) 19
NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2nd Cir. 1968) 13, 14
NLRB v. Raymond Buick, Inc., 445 F.2d 644 (2nd Cir. 1971) 14
NLRB v. Schoellkopf Products, Inc., 410 F.2d 82 (5th Cir. 1969) 16
NLRB v. Wheeling Electric Co., 444 F.2d 783 (4th Cir. 1971) 18
Peerless, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973) 18
Trico Products Corp. v. NLRB, 489 F.2d 347 (2nd Cir. 1973) 22
Universal Camera Corp. v. NLRB, 340 U.S 474 (1951) 13
Vega v. NLRB, 341 F.2d 576 (1st Cir. 1965), cert. denied 382 U.S. 862 15

Statutes

29 U.S.C. §§ 141 et seq. 12
29 U.S.C. §§ 152(3) 12
29 U.S.C. §§ 152(11) 12, 13, 17
29 U.S.C. § 157 19
29 U.S.C. § 158(a)(1) 2
29 U.S.C. § 158(a)(3) 1, 2

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-4009

SALANT CORPORATION, d/b/a CARRIZO MANUFACTURING CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review an Order of the
National Labor Relations Board

BRIEF FOR PETITIONER

Carrizo Manufacturing Co., Inc.

I. QUESTIONS PRESENTED

1. Did Petitioner violate Section 8(a)(3) of the National Labor Relations Act, as amended, by discharging employees Carlos Juarez, Pedro Patlan, and Rebecca Patlan?

2. Is the decision of the National Labor Relations Board that Carlos Juarez and Pedro Patlan were not supervisors within the meaning of the National Labor Relations Act, as amended, sup-

ported by substantial evidence based on the record considered as a whole?

3. Did Petitioner violate Section 8(a)(1) of the National Labor Relations Act, as amended, by interrogating Carlos Juarez, an alleged supervisor, on December 8, 1973, concerning dissatisfaction among Petitioner's employees?

4. Did Petitioner violate Section 8(a)(1) of the National Labor Relations Act, as amended, by announcing and granting an expanded employee benefit package on December 12, 1973?

II. STATEMENT OF THE CASE

A. Procedural History.

These proceedings were initiated by charges filed with Region Twenty-three of the National Labor Relations Board ("Board") by Obreros Unidos Independientes on December 17, 1973 (App. 330). These charges alleged that Petitioner had unlawfully terminated employees Alberto Esquivel, Jose Sosa, Pedro Patlan, Rebecca Patlan, and Carlos Juarez because of their union activities. Thereafter, on January 30, 1974, the Regional Director issued a consolidated complaint charging Petitioner with having violated Section 8(a)(3) of the National Labor Relations Act, as amended ("the Act"), by discharging the above individuals. The complaint alleged, in general terms, that Petitioner had unlawfully interrogated employees concerning their activities, all in violation of Section 8(a)(1) of the Act. (App. 338)

A hearing was held on the issues raised by the complaint before an Administrative Law Judge in Eagle Pass, Texas, on March 12 through 15, 1974, and in a decision dated May 31, 1974 (App. 9-50), the Judge found that Petitioner had violated the Act in all regards as alleged in the complaint. Petitioner

filed timely exceptions to this decision, and on October 22, 1974, the Board reversed the Judge's findings with regard to the discharges of employees Alberto Esquivel and Jose Sosa, and further reversed the Judge's finding on one instance of alleged unlawful interrogation. Nonetheless, the Board accepted and adopted the Judge's findings to the effect that Petitioner violated the Act by (1) discharging employees Pedro Patlan, Rebecca Patlan, and Carlos Juarez, (2) interrogating employee Carlos Juarez concerning employee unrest, and (3) announcing a wage and benefit increase on December 12, 1973. See 214 NLRB #21.

Petitioner subsequently filed a Motion for Reconsideration, which was denied in its entirety on January 15, 1975. With regard to employees Pedro Patlan and Carlos Juarez, the Board explicitly stated that its decision was grounded entirely upon its acceptance of the Administrative Law Judge's finding that these persons were not supervisory employees. 216 NLRB #38. Pursuant to Rule 15, Federal Rules of Appellate Procedure, Petitioner then filed the instant Petition for Review of the decision of the National Labor Relations Board.

B. Factual Background

In July, 1973, Petitioner Carrizo Manufacturing Company, Inc., began a cutting, finishing, and shipping operation in a newly completed building in Carrizo Springs, Texas. This facility is operated as a part of an integrated garment manufacturing process that includes three plants operated by Petitioner in Piedras Negras, Mexico, to produce mens' work pants together with boys' and girls' jeans. The Carrizo Springs plant receives cloth, cuts it, and ships it to one of the Mexico plants where it is sewn into a completed garment. These garments are then returned to Carrizo Springs where they are finished and shipped to Petitioner's customers (Tr. 14-16, 20, 678-679, App. 57-59, 61-62, 293-294).

It must be reemphasized that **all the events involved herein occurred during the start up phase of very large new plant.** Specifically, while the cutting department began operations in July, 1973, the finishing and shipping departments were not operational until October (Tr. 20, App. 62), with the official plant opening coming on December 4 (Tr. 661, App. 285). Although some staff personnel were working at the plant during this time, the only experienced line supervisors present during this plant start up phase were plant manager Perry Stubblefield and department heads Joe Houston (cutting) and Bill McClain (finishing and shipping) (Tr. 665, App. 288). During October and November, approximately 130 new employees were hired into the finishing and shipping departments (Tr. 688, App. 299), and at the time of the events in question there were approximately thirty employees in shipping and forty in finishing (Tr. 311, 562, 667, App. 135-136, 243, 290). Both of these departments covered immense physical space, with finishing occupying some 20,000 square feet, while shipping included an additional 70,100 square feet (Tr. 646, App. 281).

Because of the large area covered, together with the number of new employees that had been hired, additional supervision was needed, and the head of the finishing and shipping departments, Bill McClain, appointed Carlos Juarez and Pedro Patlan as assistant supervisors for the shipping and finishing departments respectively. Jesus Valdez had been working in a similar position in the cutting department for Mr. Houston since the plant opened (Tr. 665-666, App. 288-289). Both these appointments were effective November 24, 1973 (Tr. 61, App. 73), although Juarez had worked as assistant supervisor in the finishing department for some two weeks prior to being moved to the same job in shipping (Tr. 237-238, 527-531, 558-559, App. 102-103, 221-223, 240-241). The supervisory status of these two employees is a central question in this appeal, and for that reason a more detailed description of their duties will be set forth at the close of this chronology.

At the beginning of the start up phase, the prevailing wage rate in the plant was $1.60 per hour, the federal minimum wage. Petitioner had planned, however, to increase the wage rate as well as implement other employee benefits as operations became more normalized. The first step in this plan was the announcement, on November 30, that an incentive piece rate wage system was to be put into effect on the following Monday, December 3. Under this system an employee who met normal production standards would earn $2.05 per hour, and as stated above this system was merely a preliminary step in Petitioner's plan to implement an expanded employee benefit package once the plant was fully operational (Tr. 31-35, 56-59, App. 65-67, 70-72). Petitioner's President, Mr. Lipshie, visited the plant for its grand opening on December 3 through 5, and during this visit the plan was discussed. Mr. Lipshie was impressed with the efficiency that the plant had achieved in such a short time, and informed plant manager Stubblefield that as soon as the details could be worked out at corporate headquarters, Petitioner should go forward with the plans for increased employee benefits (Tr. 660-665, App. 285-288).

Prior to the announcement of these plans, however, unrest developed among some of Petitioner's employees, and meetings were held on December 6 and 7, during which a group of employees discussed their dissatisfaction with the wage and benefit package in effect at that time. These meetings were held off company premises and after working hours, and although some union officials were invited to and did attend one of the meetings, no efforts were made to organize the employees (Tr. 252-261, 267, 271-276, 457-461, 543-545, App. 112-120, 122-126, 212-215).

Petitioner first learned of these meetings on Saturday, December 8, when a local citizen who performed some contract work for Petitioner told the plant manager that some employees had held a meeting the night before (Tr. 17-19, App. 59-61). That same morning department head Bill McClain questioned Carlos Juarez concerning the meeting. McClain's sole inquiry

was directed towards discerning what problems the employees were concerned about, and no attempt was made to discover the name of any employee who attended. Juarez explained that the employees were unhappy about the level of wages and benefits then in effect. This conversation took place out in the plant where Juarez normally worked rather than in McClain's office, and it is evident that Juarez gave truthful answers to McClain's questions (Tr. 545-549, 602-603, App. 231-235, 269-270).

On the following Monday, December 10, plant manager Stubblefield telephoned Mr. Lipshie, informed him of the employee dissatisfaction, and requested that implementation of the expanded employee benefit package be expedited in light of the employee unrest (Tr. 59-60, 662, App. 72-73, 286). This request was in accord with Petitioner's established industrial relations policy of avoiding employee dissatisfaction whenever possible (Tr. 659-660, 662, App. 284-286). Two days later, on December 12, plant manager Stubblefield received permission to go forward and formally announce the institution of the benefits, and he did so in a speech to employees on that day (Tr. 662-663, 54-60, App. 286-287, 69-73). These benefits included an increase in the minimum wage, a slight adjustment in the piece rate base wage, and the establishment of medical insurance coverage and paid vacations (Tr. 54-55, App. 69-70). All these benefits were installed pursuant to an overall plan for installing employee benefits in stages as the new plant moved from the initial start up phase into a period of efficient operations (Tr. 56-60, App. 72-73).

Carlos Juarez

On December 12, 1973, Petitioner discharged Carlos Juarez for reasons which, as Petitioner has admitted (Tr. 24-25, 30, App. 62-63, 65), are unlawful should it be determined that Juarez was not a supervisor within the meaning of the Act.

Juarez began work for Petitioner in October, 1973, as an operative employee in the finishing department (Tr. 527-530, App. 221-222). He then worked as assistant supervisor in that department until November 24, when he was transferred to the shipping department as assistant supervisor, where he remained until the date of his discharge (Tr. 531, App. 222).

Petitioner's plant manager testified at length concerning Juarez's duties and responsibilities. As assistant supervisor he had direct responsibility for directing the efforts of the employees in his department to insure that production schedules were met (Tr. 685-686, App. 298-299); and in this regard Mr. Juarez had authority to assign work to employees within the department, check the quality of work to insure that it met quality standards, approve time spent in off standard time (non piece work) jobs so that employees could be compensated for that time, transfer and reassign employees between jobs, grant time off, and assign overtime (Tr. 668-670, App. 290-292). In addition, Juarez kept production records from which employees' earnings were determined (Tr. 668-670, App. 290-292). Further, Petitioner's personnel records reflected the fact that Juarez was assistant supervisor, and he was paid a differential, albeit small, above the operative employees (Tr. 61, App. 73-74). Finally, when the department head was absent, Mr. Juarez was solely responsible for all operations within the department (Tr. 673, App. 292).

Mr. Juarez not only had responsibility and authority as outlined above, but as shown by his testimony, as well as that of disinterested employee witnesses, he also exercised that authority in the discharge of his responsibility. Employees testified that the department head, Mr. McClain, was seldom in the shipping department, and McClain told an employee with Juarez present, that Juarez was in charge of the shipping department (Tr. 723-725, 728, App. 317-318, 321). Another employee testified that during Juarez's tenure as assistant supervisor in finishing, he gave her instructions regarding her work and moved em-

ployees from one machine to another (Tr. 716-717, App. 311-312). Pedro Patlan testified that the finishing and shipping areas were too large for one person to see the entire operation and that when McClain was absent he and other employees went to Juarez when they had problems and looked to him for instructions (Tr. 312-313, 373-374, 388-390, 577, App. 136-137, 173-174, 183-184, 252).

In his testimony on direct examination Mr. Juarez disclaimed his supervisory status and described his job as essentially that of a messenger between Mr. McClain and the department employees. On cross-examination, however, Juarez admitted that on several occasions he had been told that he was in charge of running his department (Tr. 573-574, 594-600, 603-604, 610-611, App. 249-250, 264-270, 274-275), and was candid in stating that he felt he was a supervisor (Tr. 562, 568-569, App. 243, 246-247). Indeed, at the employee meeting on December 7, Juarez spoke up and undertook to represent management when he told the employees that he would talk to Mr. McClain for them concerning their grievances (Tr. 543-545, App. 230-232).

Juarez, being unfamiliar with the operation of a garment plant, relied on McClain to help him learn (Tr. 576-577, App. 252-253), and while admitting that he possessed supervisory authority, Juarez stated that in most instances he wanted to clear his decisions with Mr. McClain (Tr. 584, App. 257). However, there were occasions when Juarez acted without consulting McClain (Tr. 535, 537-538, App. 225-227), including instances when he transferred employees from one production line to another in the finishing department in order to balance and thereby maximize production (Tr. 578-579, App. 253-254). This transfer and assignment of employees is the most important single responsibility within the department (Tr. 580, App. 254). In Mr. McClain's absence, which normally was in excess of fifty percent of the time (Tr. 570, App. 247), Juarez admitted that he was solely responsible for running the department (Tr. 542-

543, 566-567, 610-611, App. 230, 245-246, 274-275). Finally, in applying for unemployment compensation benefits Juarez listed his job as supervisor on the claim form (Tr. 617-618, App. 278-279), and gave a statement to an officer of the Board in which he referred to himself as a supervisor (Tr. 558-562, App. 240-243).

In addition to his overall responsibility, Juarez testified that he performed specific duties within the finishing and shipping departments. These included assigning work to new employees who came into the department (Tr. 593, App. 263), transferring employees between jobs (Tr. 535, 568-569, App. 225, 246-247), assigning overtime (Tr. 541-542, 561, 572, App. 229-230, 242-243, 249), matching employees' abilities with tasks to be performed (Tr. 568, App. 246), warning employees and counseling with them regarding poor performance (Tr. 540, 600-602, App. 228-229, 268-269), effectively recommending promotions (Tr. 574-576, App. 250-252), and keeping production records that were used not only for internal recordkeeping purposes but also to determine employees' earnings (Tr. 585-593, App. 257-263).

Pedro Patlan

With regard to this employee also, Petitioner has admitted that if he was not a supervisory employee, his discharge was unlawful (Tr. 24-25, 30, App. 62-63, 65). Pedro Patlan was hired on October 17 as an operative employee in the finishing department and was promoted to assistant supervisor in that department on November 24 upon the recommendation of Carlos Juarez (Tr. 61, 531, 574-576, App. 73-74, 222, 249-252). At the time of this promotion Patlan was given a slight wage increase over the operative employees within the department (Tr. 61, App. 73), and from November 24 until his discharge on December 10, Patlan did not perform any manual work on the machines within the department (Tr. 243, 388, App. 107, 183). At the time of his promotion, and again a few weeks later, Pat-

lan was told that he was the assistant supervisor and that the employees in the department were his employees (Tr. 238, 401, App. 103, 191-192).

Petitioner's plant manager testified that Mr. Patlan was in charge of the finishing department and had first line responsibility for insuring that the department's production standards were met, both as to volume and quality (Tr. 665, 669-670, 683-684, App. 282, 291-292, 296-297). In meeting this responsibility Patlan had authority to assign work and transfer employees to balance production, reject work that was below quality standards, keep production records that affected employees' earnings, and approve time spent by employees in off standard time (non piece rate) work (Tr. 668-670, 683-688, App. 290-292, 296-300). In supervisor McClain's absence, again more than fifty percent of the time (Tr. 318, App. 140), Patlan was in charge of all finishing department employees (Tr. 673, App. 292).

Employees within the finishing department testified that Patlan was in charge of the department, assigned them work, checked their work for quality, kept production records, and approved their requests for time off (Tr. 714-720, 738-740, 745-746, App. 310-314, 323-327). In granting one employee time off Patlan told her that she need not check with Mr. McClain (Tr. 714-716, App. 310-312).

Although Patlan testified on direct that he did little more than relay messages for Mr. McClain, he later admitted that during his last weeks with Petitioner he began to act on his own initiative on matters that arose within the department (Tr. 400-402, App. 191-192). Further, being new on the job he worked closely with McClain who was trying to help him learn his new job (Tr. 362-363, 382-383, 385, App. 167-168, 179-181). As far as his duties were concerned, Patlan admitted on cross-examination that either with the concurrence of McClain or on his own initiative he took production counts twice daily (Tr. 239-

242, 342-343, App. 104-106, 154-155), reported any absences (Tr. 242-377, App. 106-176), verbally warned employees and counseled with them regarding their performance (Tr. 245-246, 409-417, App. 106, 107, 194-200), assigned work and moved employees around within the department to increase production (Tr. 247, 324-325, 355, 396, App. 109, 143-144, 188), made judgments as to the quality of work done by department employees (Tr. 325-326, 381-384, App. 144-145, 178-180), assigned overtime (Tr. 363-368, 384-385, 396, 400-402, App. 168-172, 180-181, 191-192), and gave employees permission to leave the plant at the end of their work shift (Tr. 337-338, 342-343, 350, App. 151-152, 154-155, 159).

Patlan felt as though he were in charge of the department (Tr. 311, 318, App. 135-136, 140), and the employees looked to him for leadership and came to him when they had problems with their machines (Tr. 283, 326-327, 353-355, App. 130, 144-145, 161-163). Finally, a series of meetings were held with groups of employees within the finishing department to explain the new piece rate system and Patlan was the only person within the department who attended every meeting (Tr. 306-309, App. 133-135).

Rebecca Patlan

Rebecca Patlan worked in the office for plant manager Stubblefield, and her duties included typing his letters, taking messages, and placing phone calls (Tr. 91-93, 697-699, App. 83-85, 302-303). The office area was small, and all office employees, including Ms. Patlan, had access to confidential files (Tr. 700, 708, App. 304, 308). Ms. Patlan was the wife of Pedro Patlan, and stated that she thought Petitioner had treated him unfairly (Tr. 91, App. 83). She was terminated because Petitioner felt that due to her relationship with her husband and the sensitive nature of the position she held, she would be unable to work closely with Petitioner's management, as was required by the nature of her job (Tr. 697-699, App. 302-303).

III. ARGUMENT

A. The Discharge Issues.

1. Carlos Juarez and Pedro Patlan

(a) Supervisors are not protected by the National Labor Relations Act.

Having admitted that it discharged both the above employees for reasons that are proscribed by the Act, Petitioner submits that as supervisors neither employee comes within the Act's protection, and both may be discharged for engaging in activity that is otherwise protected. **NLRB v. Big Three Welding Equipment Co.,** 359 F.2d 77 (5th Cir. 1966). This proposition was recently reaffirmed in **Beasley v. Food Fair, Inc.,** — U.S. —, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974), and **NLRB v. Bell Aerospace Co.,** 416 U.S. 267, 40 L. Ed. 2d 134 (1974), where the Court traced the legislative history of the 1947 amendment to the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*, and found that Congress did not intend for the Act to extend to or cover supervisory employees. Specifically, 29 U.S.C. §§ 152 (3) and (11), combine to exclude supervisors from the Act's definition of employee. This was done to preserve and protect management's right to insist on totally loyal supervisors and was further intended to allow management wide discretion in dealing with supervisory employees so as to avoid obliterating the much needed clear line of demarcation between management and labor and thereby prevent potential conflicts of interest. **NLRB v. Bell Aerospace Co.,** *supra*. It is clear beyond cavil that if Carlos Juarez and Pedro Patlan were supervisors within the meaning of 29 U.S.C. § 152(11) their discharges did not violate the Act.[1]

---

[1] Again, the Board's decision was based solely on its adoption of the Administrative Law Judge's finding that these persons were not supervisors. See 216 NLRB No. 38 at n. 2.

(b) **The board's factual findings are not supported by substantial evidence in the record considered as a whole.**

The supervisory status of these employees is primarily a factual question, and in reviewing the Board's decision the court is bound to affirm the Board's factual findings if these findings are supported by substantial evidence in the record considered as a whole. **Universal Camera Corp. v. NLRB,** 340 U.S. 474 (1951). While the Board's factual determinations are entitled to some deference, this court has not hesitated to reverse the Board and find that supervisory status exists when the Board's decision fails to meet the substantial evidence test. **NLRB v. Metropolitan Life Ins. Co.,** 405 F.2d 1169 (2nd Cir. 1968). Petitioner submits that the Board, in summarily adopting the findings of the Administrative Law Judge, failed to consider the uncontradicted testimony of disinterested employee witnesses as well as the admissions made by both these employees during their testimony and in statements given to NLRB investigators. Rather, the Board chose to ignore this testimony, discredit Petitioner's management witnesses, and accept the self serving, conclusory statements made by Patlan and Juarez themselves, even when this testimony contradicted their sworn statements given to the Board's investigators.

Based on a fair reading of the relevant portions of the entire record, taken together with the legal standards adhered to by this and other courts of appeal, there can be no doubt but that the employees in question were supervisors. It is well established that 29 U.S.C. § 152(11)[2] must be read in the disjunctive, and

---

[2] "The term 'supervisor' means any individual having authority, in the interest of the employer, (1) to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or (2) responsibly to direct them, or to adjust their grievances, or (3) effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (numerical subdivision added as in **Arizona Public Service Co. v. NLRB,** 453 F.2d 228 (9th Cir. 1971)).

if one of the criteria for supervisory status is met, the employee must be excluded from the protection of the Act. **Amalgamated Local 355 v. NLRB,** 481 F.2d 996 (2nd Cir. 1973). This court has given special consideration to certain factors in determining whether an employee or group of employees are supervisors within the meaning of the Act. The fact that an employee does not perform any manual tasks but instead spends his time assigning and scheduling the work of others has been deemed controlling, **Amalgamated Local 355 v. NLRB,** *supra*, as has the fact that other employees looked to the employee in question for leadership and considered him as a supervisor, **NLRB v. Raymond Buick, Inc.,** 445 F.2d 644 (2nd Cir. 1971). In **NLRB v. Big Ben Department Stores, Inc.,** 396 F.2d 78 (2nd Cir. 1968), "lead girls" were deemed to be supervisors even though they had no authority to hire, fire, or discipline employees where these "lead girls" exercised independent judgment in transferring employees from one work station to another in response to business demands. Employees who assign work to crew members, grant time off, adjust minor grievances, discipline crew members and transfer employees from one job to another have been found to be supervisory employees. **NLRB v. Metropolitan Life Ins. Co.,** *supra*. All these factors were present with regard to employees Carlos Juarez and Pedro Patlan, but the Board chose to ignore the great weight of the evidence and instead adopt the findings of the Administrative Law Judge.

The Board also failed to consider the fact, more than adequately supported in the record, that this was a start up operation that involved the training of an entirely new work force. In this regard it is only natural that both Juarez and Patlan, being new in their jobs, were somewhat careful in exercising the authority that had only recently been conferred upon them. Again this court has recognized that a new employee is no less a supervisor merely because he had not assumed the full range of his responsibility, and was being assisted by the old supervisor, especially where the employee had been presented to his sub-

ordinates as the "new boss". **NLRB v. Marsellus Vault & Sales, Inc.,** 431 F.2d 933 (2nd Cir. 1970). **Accord, NLRB v. Excelsior Laundry Co.,** 459 F.2d 1013 (10th Cir. 1972).

In factual settings similar to the instant case, both the Board and the courts have uniformly found supervisory status to exist. Perhaps the two most illustrative cases are **Mathews & Co. v. NLRB,** 354 F.2d 432 (8th Cir. 1965), **cert. denied** 384 U.S. 1002, and **NLRB v. Greenfield Components Corp.,** 317 F.2d 85 (1st Cir. 1963). In **Mathews** the court examined ten separate indicia of supervisory authority and found leadmen to be supervisors based on the facts that the leadmen (1) assigned work to employees within their department, (2) transferred employees from one job to another, (3) approved requests for time off, (4) effectively recommended discipline, (5) checked employees' work for quality, (6) attended some supervisory meetings, (7) were paid from eleven to forty cents per hour more than other employees, (8) were regarded as supervisors by company officials, and (9) were regarded as supervisors by employees within the department. Most important was the fact that if these leadmen were not supervisors, then the employer's superintendent would be responsible for the supervision of thirty-seven employees, an inordinately large number. This last factor was also given controlling weight in **Vega v. NLRB,** 341 F.2d 576 (1st Cir. 1965), **cert. denied** 382 U.S. 862, where other factors indicative of supervisory status were lacking. Both Patlan and Juarez met most if not all of the criteria above, and if neither is a supervisor it is apparent that department head Bill McClain is solely responsible for the supervision of some seventy employees scattered over an area of 90,100 square feet. Such a result is inherently incredible.

Even more in point is **NLRB v. Greenfield Components Corp.,** *supra*, where the employee in question (1) worked in a department where his immediate superior was seldom present, (2) took instructions from his superior regarding products to be produced

and specific employee assignments but retained the authority to assign some tasks and was responsible for both the quality and quantity of production, (3) kept time and production records, (4) transferred employees to different jobs on his own initiative, (5) disciplined employees who loafed, (6) approved time off for cause, (7) was recognized as a supervisor by department employees, and (8) was introduced to department employees by management as a supervisor. Based on these findings the court did not hesitate to find that the employee was a supervisor within the meaning of the Act, and it is submitted once more that a review of the record herein reveals that both Patlan and Juarez substantially met all of the above criteria.

Within the garment industry itself, other courts have evaluated jobs similar to those held by Juarez and Patlan and have found employees holding these jobs to be supervisors under factual circumstances nearly identical to those herein. **NLRB v. Schoellkopf Products, Inc.,** 410 F.2d 82 (5th Cir. 1969); **Brewton Fashions, Inc. v. NLRB,** 361 F.2d 8 (5th Cir. 1966), **cert. denied** 385 U.S. 842. Lest it be argued that the functions performed by Juarez and Patlan were routine as opposed to involving the exercise of independent judgment, the court's attention is called to **Arizona Public Service Co. v. NLRB,** 453 F.2d 228 (9th Cir. 1971), where the Board had relied on this argument but was reversed based on a consideration of the entire record. On the whole the supervisors in **Arizona Public Service Co.** exercised less authority than did the employees in the above cases, but the court found that it was sufficient that they exercised independent judgment in responsibly directing other employees during part of the work day. A close reading of the entire record makes the conclusion inescapable that Juarez and Patlan exercised the same or a greater degree of independent judgment.

As a final note, the uncontroverted fact that both Patlan and Juarez gave statements in which they listed their job as that of assistant supervisor cannot be ignored. This has been held to

be a significant fact even where the employee in question had no authority to hire or fire, punched a time clock, and was paid an hourly rate. **NLRB v. Kolpin Bros. Co.,** 379 F.2d 488 (7th Cir. 1967).

Petitioner submits that a review of the record as a whole together with the established and well-accepted legal standards for evaluating indicia of supervisory status can yield no conclusion but that both Carlos Juarez and Pedro Patlan were supervisors within the meaning of 29 U.S.C. § 152(11). In accepting the Administrative Law Judge's determinaton, the Board failed to give proper consideration to the testimony of disinterested and impartial employee witnesses, but rather merely accepted the conclusory statements of Patlan and Juarez, notwithstanding the conflicting factual information elicited from them on cross-examination. The record is replete with specific examples of the exercise of supervisory authority by both these employees, and these examples come from various sources including admissions made by both employees on cross-examination and in pre-hearing affidavits, testimony of disinterested employee witnesses, and the testimony of management officials. Nonetheless, the Board ignored this evidence and chose to base its findings on the self serving, conclusory statements given by Juarez and Patlan themselves during the hearing. In the face of the Board's treatment of the evidence, it cannot be said that the Board's factual findings are supported by substantial evidence in the record considered as a whole, and accordingly these findings should not be accepted.

2. **Rebecca Patlan**

(a) **The record as a whole impels the conclusion that Rebecca Patlan was a confidential employee not protected by the Act.**

It is uniformly accepted that a confidential employee is not within the class of employees protected by the Act and may be discharged for reasons that are otherwise unlawful. **Peerless, Inc. v. NLRB,** 484 F.2d 1108 (7th Cir. 1973); **NLRB v. Wheeling Electric Co.,** 444 F.2d 783 (4th Cir. 1971). In large measure the facts regarding Mrs. Patlan's status as a confidential employee are not in conflict in the record. Ms. Patlan worked in a small office area also shared by plant manager Stubblefield and had access to Mr. Stubblefield's files. Further, Ms. Patlan placed calls for him, opened his incoming mail, and typed his outgoing mail. Towards the end of her tenure Ms. Patlan was training for a new job, but even in this new job she would work in the small office area and have access to confidential information. In short, Ms. Patlan occupied a sensitive position, and in view of her husband's discharge and her natural feelings of sympathy for him, Petitioner felt compelled to protect its interests in maintaining confidentiality, and accordingly Ms. Patlan was discharged. At first blush this may appear to be a harsh measure, but in prior cases the Board and the courts have recognized Petitioner's right to take extreme measures in dealing with confidential employees.

(b) **An employee may be discharged for any reason not prohibited by the Act.**

Even if it is determined that Rebecca Patlan was not a confidential employee her discharge was for a reason that is not unlawful. It is accepted doctrine that the Act only protects employees in the exercise of their rights granted by 29 U.S.C.

§ 157. Accordingly, it has been held that an employee may be discharged for good cause, bad cause, or no cause at all so long as the discharge was not for a reason prohibited by the Act. **NLRB v. McGahey,** 223 F.2d 405 (5th Cir. 1956).

The factual finding of the Administrative Law Judge and the Board regarding the reason for Ms. Patlan's discharge is not contested. Ms. Patlan was discharged because due to her close relationship with her husband and her natural sympathy with his plight, it was felt that she would be unable to continue to function effectively in her job, which required that she cooperate closely with the same management officials who were responsible for her husband's discharge.

Regardless of Pedro Patlan's status as a supervisor, and regardless of whether his discharge was lawful or unlawful, once the decision had been made to discharge Mr. Patlan, it was apparent that Ms. Patlan could not be expected to continue to function effectively in her job. Thus notwithstanding the motivation behind the discharge of Pedro Patlan, the sole motivation for Ms. Patlan's discharge was related to her performance as an employee and did not involve any element of concern about her involvement with the employee unrest. Simply put, once Pedro Patlan's discharge, for whatever reason, was an accomplished fact, Petitioner then had a legitimate concern about Rebecca Patlan's ability to work directly with and for the management official responsible for her husband's discharge. This concern was in no way related to the fact that Rebecca Patlan may or may not have been involved or participated in the employee meetings, but rather Petitioner acted out of motives that were purely nondiscriminatory. Consequently, the Board erred in its adoption of the Administrative Law Judge's legal conclusion that the reason advanced for Ms. Patlan's discharge was violative of the Act.

B. **The Grant of Benefits.**

Where a Decision to Grant Benefits Has Been Made Prior to the Advent of Any Union Activity, It Is Not Unlawful to Implement the Decision Contemporaneously With the Union Activity and in Response to Complaints From Employees.

In deciding that Petitioner's announcement on December 12, 1973, concerning the implementation of its full range of employee benefits was unlawful, the Board ignored the fact that Petitioner's officials had discussed this action prior to the advent of the employee unrest. Rather the Board accepted the apparent conclusion of the Administrative Law Judge that Petitioner's action in expediting these benefits was in itself unlawful. The record stands uncontradicted to the effect that the implementation of these benefits was decided upon during the visit of Petitioner's president, Mr. Lipshie, on December 3 through 5. The first employee meeting was held December 6, and Petitioner did not learn of these meetings until December 8. Thus the record established without conflict that Petitioner did not conceive of the grant of benefits in response to the employee dissatisfaction. On the contrary it is undisputed that plans for expanding employee benefits existed prior to any action by employees to protest the benefit level and certainly before Petitioner learned of any such activity.

Through the testimony of its witnesses Petitioner admitted that, in accord with established company policy of responding to employee complaints, it expedited the announcement concerning the planned increase in employee benefits. Under similar circumstances this court has reversed the Board's determination that a grant of benefits is unlawful. In **NLRB v. M. H. Brown Co.,** 441 F.2d 839 (2nd Cir. 1971), the court held that where the employer had a preconceived plan to implement benefits, it was not unlawful to do so in the face of union activity or in response to employee complaints. Petitioner's conduct in an-

nouncing and implementing the expanded employee benefit package was in accord with this court's established precedent, and there being no factual dispute concerning the exact course of action taken, the Board's conclusion is due to be reversed.

C. The Interrogation.

(1) A supervisory employee may lawfully be questioned regarding his knowledge of concerted activity by employees.

The Board's finding of unlawful interrogation was based on the testimony of Carlos Juarez about a conversation between Juarez and Bill McClain on December 8 regarding the meetings held by employees on the nights of December 6 and 7 (Tr. 545-549, 602-603, App. 232-235, 269-270). Should it be determined that Juarez is a supervisory employee, the finding that Petitioner violated the Act by interrogating him must be reversed also. Supervisory employees, being unprotected by the Act, may lawfully be interrogated regarding any subject.

(2) The interrogation herein did not exceed the limited questioning permitted by this court's decision in Bourne v. NLRB, 332 F.2d 47 (2nd Cir. 1964).

Even if it should be determined that Juarez was not a supervisor, the limited inquiry conducted by Bill McClain did not constitute an unlawfully coercive interrogation. The entire testimony regarding this interrogation came from Juarez himself (Tr. 545-549, 602-603, App. 232-235, 269-270), and again the facts are not disputed. The questioning took place in the department where Juarez worked as opposed to in McClain's office, and McClain worked with Juarez on a daily basis, so that the conversation occurred in a natural setting. Further McClain

made no attempt to discover who attended the meetings and received a truthful reply to his questions. McClain's sole line of inquiry involved an attempt to discover why the employees were dissatisfied and were holding meetings. This court has repeatedly held that under these same circumstances an interrogation is not unlawful. **Trico Products Corp. v. NLRB,** 489 F.2d 347 (2nd Cir. 1973); **NLRB v. M. H. Brown,** 441 F.2d 839 (2nd Cir. 1971); **Bourne v. NLRB,** 332 F.2d 47 (2nd Cir. 1964). It is manifest that the Board's adoption of the Administrative Law Judge's legal conclusion is contrary to established precedent within this circuit and should be reversed.

IV. CONCLUSION

It is respectfully submitted that the Board's decision regarding the supervisory status of employees Carlos Juarez and Pedro Patlan is not supported by substantial evidence in the record considered as a whole. Further, the Board's legal conclusions with regard to the discharge of Rebecca Patlan, the interrogation of Carlos Juarez and the grant of benefits on December 12 are erroneous and are due to be reversed. Accordingly, Petitioner requests the court to set aside the Board's decision insofar as that decision finds that Petitioner has committed any unfair labor practices by any of its actions taken herein.

Respectfully submitted

CONSTANGY, BROOKS & SMITH
GEORGE B. SMITH
LOWELL W. OLSON
ALAN L. ROLNICK
1900 Peachtree Center Building
230 Peachtree Street, N. W.
Atlanta, Georgia 30303
Attorneys for Petitioner

State of Missouri,
City of St. Louis. } ss.

Willie Brown, of lawful age, being duly sworn, upon his oath states that he did, on the 13th day of June, 1975, place in the United States Post Office at St. Louis, Missouri, a package containing three printed copies of Appendix, three printed copies of Brief for Petitioner and three printed copies of Reply Brief for Petitioner in the following entitled cause:

that the proper postage was affixed to said package, and that it was plainly addressed to the following party:

Mr. John Depenbrock, Attorney
Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Willie Brown
Affiant.

Subscribed and sworn to before me this 13th day of June, 1975
I am duly authorized under the laws of the State of Missouri to administer oaths.
My Commission Expires Oct. 1, 1977

Richard W. Reed
Notary Public within and for the City of St. Louis, Missouri.

To be filed for

CONSTANGY, BROOKS & SMITH
GEORGE B. SMITH
LOWELL W. OLSON
ALAN L. ROLNICK
1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 525-8622
Attorneys for Petitioner, Salant Corporation, d/b/a Carrizo

State of Missouri, }
City of St. Louis. } ss.

Willie Brown, of lawful age, being duly sworn, upon his oath states that he did, on the 13th day of June, 1975, place in the United States Post Office at St. Louis, Missouri a package containing three printed copies of Appendix, three printed copies of Brief for Petitioner and three printed copies of Reply Brief for Petitioner in the following entitled cause:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-4009

SALANT CORPORATION, d/b/a CARRIZO MANUFACTURING CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

that the p t was plainly add

Mr.
Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Willie Brown
Affiant.

Subscribed and sworn to before me this 13th day of June, 1975
I am duly authorized under the laws of the State of Missouri to administer oaths.
My Commission Expires Oct. 1, 1977

Richard W. Reed
Notary Public within and for the City of St. Louis, Missouri.

To be filed for

CONSTANGY, BROOKS & SMITH
GEORGE B. SMITH
LOWELL W. OLSON
ALAN L. ROLNICK
1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 525-8622